BEST AVAILABLE COPY

No. 85-483

Supreme Court, U.S.
FILED
NOV 26 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1985

JESSEL ROTHMAN, P.C.,

Petitioner,

against

NEW YORK STATE DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Respondent
Two World Trade Center
New York, New York 10047
(212) 488-4940

O. PETER SHERWOOD
Deputy Solicitor General

JUDITH A. GORDON
BARRIE L. GOLDSTEIN
Assistant Attorneys General
Of Counsel

23P

TABLE OF CONTENTS

	PAGE
Table of Authorities	II
Statement of the Case	1
This Court Should Deny the Petition	11
Conclusion	18

TABLE OF AUTHORITIES

PAGE

Cases:

Acevedo v. INS, 538 F.2d 819 (2d Cir. 1976) 15

Baker Industries v. Cereberus, Ltd. 764 F.2d 204 (3d Cir. 1985) 15

Barnd v. City of Tacoma, 664 F.2d 1339 (9th Cir. 1983) 16

Blair v. Shenandoah Women's Center, 757 F.2d 1435 (4th Cir. 1985) 14

Browning Debenture Holders' Committee v. DASA Corp., 560 F.2d 1078 (2d Cir. 1977) 14

Codd v. Velger, 429 U.S. 624 (1977) 17

Eash v. Riggins Trucking Inc., 757 F.2d 557 (3d Cir. 1985) 16

Gamble v. Pope & Talbot, Inc., 307 F.2d 729 (3d Cir.), *cert. denied, sub nom.* United States v. Mahoney, 371 U.S. 888 (1962) 17

In re Cosmopolitan Aviation Corp., 763 F.2d 507 (2d Cir. 1985) 1

Knorr Brake Corp. v. Harbil, 738 F.2d 223 (7th Cir. 1984) 15

Link v. Wabash Railroad Co., 370 U.S. 626 (1962) 17

Malhiot v. Southern California Retail Clerks Union, 735 F.2d 1133 (9th Cir. 1984), *cert. denied, sub nom.* Jampol v. Southern California Retail Clerks Union, 105 S.Ct. 959 (1985) 16

Miranda v. Southern Pacific Transportation Co., 710 F.2d 516 (9th Cir. 1983) 16

PAGE

Mildner v. Gulotta, 405 F. Supp. 182 (E.D.N.Y. 1975), *aff'd*, 425 U.S. 901 (1976) 16
Muigai v. United States, 682 F.2d 334 (2d Cir. 1982) 14

Nemeroff v. Abelson, 704 F.2d 652 (2d Cir. 1983) 14

Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980) ..... *passim*

Sierra Club v. United States Army Corp. of Engineers, No. 84-6287 (2d Cir. Oct. 28, 1985) 14
Smiga v. Dean Witter Reynolds, Inc., 766 F.2d 698 (2d Cir. 1985) 16, 17

Tatum v. Regents of University of Nebraska Lincoln, 462 U.S. 1117 (1983) 14, 15, 16
Tedeschi v. Smith Barney, 579 F. Supp. 657 (S.D. N.Y. 1984), *aff'd*, 757 F.2d 465 (2d Cir.), *cert. denied, sub nom.* Chapman v. Smith Barney, 54 U.S.L.W. 3226 (Oct. 10, 1985) 14, 15
Textor v. Board of Regents, 711 F.2d 1387 (7th Cir. 1983) 16

United States v. Blodgett, 709 F.2d 608 (9th Cir. 1983) 16
United States v. Nesglo, Inc., 744 F.2d 887 (1st Cir. 1984) 13, 17
United States v. Potamkin Cadillac Corp., 689 F.2d 379 (2d Cir. 1982) 14
United States Freight Co. v. Penn Central Transportation Co., 716 F.2d 954 (2d Cir. 1983) 16

PAGE

Statutes and Rules:

28 U.S.C. § 1912 2
28 U.S.C. § 1927 ..... *passim*
Rules of the United States Supreme Court:
Rule 17 11
Rule 49.2 15
Federal Rules of Appellate Procedure:
Rule 4 6
Rule 30(b) 6
Rule 38 ..... 2, 12
Federal Rules of Civil Procedure:
Rule 37 16

Miscellaneous:

H.R. Rep. No. 1234, 96th Cong. 2d Sess. 8, *reprinted in*, 1980 U.S. CODE CONG. & AD. NEWS 2781 11
Martineau, "Frivolous Appeals: The Uncertain Federal Response", 1984 DUKE LAW JOURNAL 845 15

No. 85-483

IN THE

Supreme Court of the United States

October Term, 1985

JESSEL ROTHMAN, P.C.,

Petitioner,

against

NEW YORK STATE DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

Statement of the Case

The opinion of the United States Court of Appeals for the Second Circuit, issued on May 24, 1985, dismissed an appeal brought by Cosmopolitan Aviation Corporation, a debtor in a pending bankruptcy case, and by Flushing Savings Bank, a secured creditor of Cosmopolitan and its alleged assignee. *In re Cosmopolitan Aviation Corp.*, 763 F.2d 507 (2d Cir. 1985); D3.[1] The Second Circuit held

1. The Second Circuit slip opinion is reproduced in Appendix D to the petition for a writ of certiorari. References to it in this brief are to the pages of Appendix D.

that Cosmopolitan did not have standing to appeal from an order entered by the United States District Court for the Eastern District of New York (Mishler, J.) on December 7, 1984 (the "challenged order") because it earlier had been ordered liquidated by the bankruptcy court. *Id.* The court also held that Flushing had not invoked the court's jurisdiction because it had not filed a timely notice of appeal. *Id.*

After giving them notice and an opportunity to be heard, the Second Circuit held, in addition, that Cosmopolitan, Flushing and their attorneys had engaged in "truly remarkable bad faith during the appeal" because they "continually mischaracterized facts, prior proceedings and the law." D4. The court said that it had "been used" and that "[t]he attorneys representing Cosmopolitan and Flushing . . . [had] unreasonably multiplied the proceedings in this case and . . . [were] guilty of willful abuse of process." D23. Pursuant to its inherent power, Rule 38 of the Federal Rules of Appellate Procedure ("FRAP") and 28 U.S.C. §§ 1912 and 1927, the Second Circuit directed that Cosmopolitan, Flushing and their attorneys compensate appellee below and respondent here, the New York State Department of Transportation (the "State"), for its reasonable attorneys' fees incurred on the appeal. It then "remanded to the district court for the calculation of sanctions." D24.[2] Only petitioner Jessel Rothman, P.C.

2. On remand, the State has submitted affidavits demonstrating that it incurred $49,046.75 of attorneys' fees for its defense of the frivolous appeal. The Second Circuit did not hold that the State was entitled to fees for any other proceedings, and Rothman does not face an assessment of $361,260.55 as a result of the opinion.

(footnote continued on next page)

("Rothman"), Flushing's attorney below, requests review of the Second Circuit's decision which ended a simple landlord-tenant dispute involving seven federal and state courts from 1979.

The case first came before the Second Circuit on December 14, 1984 when Rothman and Cosmopolitan's attorneys applied, at the eleventh hour, for an emergency stay of the challenged order. The Clerk of the court awarded a stay until December 18 when a panel of the court could consider the application. *See* December 14, 1984 Order of the Second Circuit. The entry of the challenged order in the district court followed the completion of state court proceedings commenced in September 1979 to evict Cosmopolitan from State-owned Republic Airport.[3] In those proceedings, the State obtained a judgment evicting Cosmopolitan which, by December 14, 1984, had been affirmed by the New York State Court of Appeals.[4]

Contrast petition at 14. Instead, the court merely invited the State to move for an award and the district court to grant "attorneys' fees for all of the multitudinous and vexatious proceedings in which Flushing and Cosmopolitan were involved in the federal system." D24. The State has so moved and requested the district court to award attorneys' fees of $314,152.25 for litigation occuring for over three years in lower court proceedings. The State's motion is *sub judice* as is the district court's calculation of the fees incurred in the Second Circuit.

3. The airport, located in Farmingdale, New York, originally had been owned by the Metropolitan Transportation Authority. Ownership of the airport was transferred to the Transportation Department in June 1982.

4. To allow New York's highest court to review the eviction judgment of an intermediate state appellate court, the district court previously had stayed an April 1984 bankruptcy court order directing Cosmopolitan's trustee to turn over the Cosmopolitan premises to

(footnote continued on next page)

On December 18, Rothman appeared before a Second Circuit panel (Meskill, Kearse, and Cardamone, J.J.) in support of the Flushing-Cosmopolitan stay application. *See* Transcript of December 18, 1984 proceedings before the Second Circuit at 11-21.[5] He asserted that Flushing: (1) had been denied an opportunity to participate in proceedings before the bankruptcy and district courts (*id.* at 15-16, 18, 20-21); (2) had a right under state law to obtain possession of the former Cosmopolitan premises (*id.* at 11, 15-16); and (3) was pursuing state court remedies to obtain possession. *Id.* at 16, 20. Circuit Judge Meskill, who sat on the stay panel and authored the opinion below, later found that Rothman had neglected, among other matters, to advise the court during the December 18 argument that: (1) Flushing had actual notice of all relevant bankruptcy and district court proceedings but had declined to participate in some of these proceedings (D22); (2) no possessory right existed under state law, and even if it did exist, the right belonged to Cosmopolitan (D19-D20); and (3) Flushing's pursuit of state court remedies was a collateral attack on the bankruptcy court order which had liquidated Cosmopolitan in December 1983 and which had remained ignored. D11.

Although the State advised the Second Circuit that the Flushing-Cosmopolitan stay application was "made entirely in bad faith" (December 18 transcript at 23), the

---

the State. D11. The district court on December 7, 1984 vacated its earlier stay and directed that the State be put in possession of the premises no later than December 14, 1984 given the state court judgment affirming that Cosmopolitan's lease had expired in 1979.

5. The December 18, 1984 transcript has been lodged with this Court.

court, entertaining the application on an emergency basis, did not have the benefit of the complete record. Under these circumstances, it appears that the court felt constrained, "mistakenly as it turn[ed] out" (D13), to accept Rothman's characterization of facts and prior proceedings and his representation that Flushing would suffer irreparable injury without the court's intercession. Thus, the Second Circuit awarded an interim stay on December 20, 1984. It also expedited the appeal and scheduled oral argument for January 23, 1985. *Id.*

Rothman continued to "mischaracterize facts, prior proceedings and the law" in his brief on the merits.[6] D4. The State so demonstrated in its opposing brief which was "essentially and consistently unbiased and balanced. . . ." *Id.* Given Rothman's conduct, the State there renewed its assertion of bad faith and requested that the Second Circuit sanction Rothman pursuant to 28 U.S.C. § 1927.

The State's brief also raised Rothman's failure to file a notice of appeal—a jurisdictional impediment to the Second Circuit's review of the challenged order.[7] Four days after service of the State's brief, Rothman sought to remedy

---

6. The attorneys for Cosmopolitan did not file a brief. *Id.*

7. This was not the first occasion that Rothman had failed to file a notice of appeal from an order but, nonetheless, had participated in appellate proceedings. In the spring of 1984, Cosmopolitan, "[p]urporting to represent" Flushing's interest (D10), had appealed to the district court from the bankruptcy court's order directing Cosmopolitan to turn over possession of its premises to the State. D10. While Rothman had participated in the district court proceedings from which the challenged order had resulted (D22), he had not made Flushing a formal party. D12. He belatedly moved for Flushing's intervention in the appeal which Cosmopolitan had taken to the district court. His motion was granted on December 14, 1984.

his failure to abide by FRAP.[8] *See* affidavit of Barrie L. Goldstein, sworn to on January 18, 1985, at ¶ 2 & n.**. On this untimely date, he, pursuant to Rule 4 of FRAP, applied to the district court (Altimari, D.J.) for leave to file a late notice of appeal. D13. In support of his application, he claimed that he had believed that: (1) the filing of a notice of appeal by Flushing was unnecessary because the *district court* on December 14 had permitted Flushing to intervene in the *Second Circuit*, and Cosmopolitan had filed a notice of appeal; (2) in any event, it would be inequitable to bar Flushing from the appeal in the Second Circuit; and (3) his time to file a notice of appeal had not expired under his reading of Rule 4 of FRAP. D17-D18.

On January 21, 1985, the district court entertained Rothman's application to file a late notice of appeal, and the court granted the application that day. D13. The State moved to consolidate its appeal from this district court order with the pending appeal to be heard two days later. The Second Circuit granted the State's motion. *Id.*

Rothman did not appear at the oral argument on the merits of the appeal held before a Second Circuit panel

8. Rothman earlier had failed to abide by the designation procedure established in Rule 30(b) of FRAP for the furnishing of a joint appendix. His conduct required the State to move for leave to file a voluminous supplemental appendix containing documents which Rothman had left out of his joint appendix. *See* notice of motion for leave to file a supplemental appendix dated January 14, 1985. Rothman opposed the State's motion. *See* letter of Jessel Rothman to the Second Circuit dated January 17, 1985. The State then had to respond. *See* affidavit of Barrie L. Goldstein sworn to on January 17, 1985. The Second Circuit granted the State's motion. *See* January 21, 1985 order of the Second Circuit.

(Van Graafeiland, Meskill, Winter, J.J.) on January 23, 1985. *See* Transcript of January 23, 1985 proceeding before the Second Circuit at 2.[9] He sent Julian Kaplan, Esq., an associate, in his stead. The Second Circuit first commented on Rothman's absence and requested confirmation that Rothman had been the attorney who had argued for the stay on December 18. *Id.* at 5. Rothman's associate so confirmed. *Id.*

The court proceeded to question Rothman's associate on numerous representations which Rothman had made during his December 18 oral argument and had elaborated upon in his brief. For example, the court sought a satisfactory explanation as to how Rothman could claim that Flushing had a right to possession when the relevant documents demonstrated that Flushing had long ago—in July 1979—waived any such righ *See* January 23 transcript at 9-10.

Receiving what the Second Circuit later held to be evasive and unsatisfactor answers (D4), the court instructed Rothman's associate to "remember" that the State had "asked for an award under Section 1927 [and] [t]hat's one of the issues in this case." *Id.* at 19. Despite the court's warning, Rothman's associate continued to maintain the positions taken by Rothman during his previous oral argument and in his brief. Thus, the court asked Rothman's associate to acknowledge the stated findings of the bankruptcy court's order liquidating Cosmopolitan. *Id.* at 20. Rothman's associate refused. *Id.*

---

9. Rothman has appended only a portion of the January 23 transcript to the petition. *See* Appendix C to the petition. A more complete transcript has been lodged with the Court.

At the conclusion of the oral argument on January 23, the Second Circuit vacated its December 20 stay. D13. The court further directed the submission of supplemental briefs on the issue of the extent of the court's power to award sanctions against Rothman, among others, "and the best method for calculating the amount." *Id.*

Following the Second Circuit's instruction, the State's supplemental brief discussed various jurisdictional predicates, including the court's inherent power and 28 U.S.C. § 1927, for the award of reasonable attorneys' fees against Rothman and the others involved on the appeal. *See* State's supplemental brief, dated February 13, 1985, at 2-5. The State also suggested that the Second Circuit remand the question of the amount of fees to the district court, a forum more equipped to engage in any necessary fact-finding. *See id.* 7-8.

Rothman submitted a 21 page supplemental brief and a 23 page affidavit to the Second Circuit.[10] In both, Rothman, at great length, detailed why he and Flushing should not be sanctioned as a matter of law. He cited the canons of ethics and the Second Circuit's December 20 stay as validating the *bona fides* of his position. Rothman aff. at ¶¶ 34-37. Rothman also explicitly recognized that the State sought the imposition of "sanctions against Flushing *and its attorneys*. . . ." (Emphasis supplied.) Rothman br. at 6. *See* Rothman aff. at ¶ 2 ("This affidavit is submitted in opposition to . . . the assessment of attorneys fees and costs against Flushing and/or my firm. . . .")

10. The Rothman supplemental brief and affidavit, sworn to March 13, 1985, have been lodged with the Court.

The Second Circuit issued its unanimous opinion and judgment on May 24, 1985. It initially observed that this "simple dispute . . . has . . . been inordinately complicated by the combined machinations of Cosmopolitan and Flushing." D4. The court proceeded to recite the facts and prior proceedings which, it concluded, contrasted markedly with the description Rothman and his associate previously had offered. *Id.* The court then stated that it "lacked jurisdiction to decide the merits of this case," but that it "address[ed] them solely to explain why we believe that sanctions against Cosmopolitan, Flushing, and their attorneys are appropriate." D13.

With that caveat, the Second Circuit turned to the merits. It directed its attention to Rothman's arguments in support of his failure to file a notice of appeal. His arguments were said to be "implausible," "[n]ot surprisingly, . . . [without support]" and "tantamount to a direct affront." D17. Circuit Judge Meskill, for the court, also rejected the argument, advanced by Rothman in his supplemental submissions in opposition to the award of sanctions, that the court's earlier stay, which Judge Meskill together with two colleagues had granted, insulated Rothman from a finding of bad faith (D19):

> *We believe that an objective review of the record reasonably and unequivocally suggests that the stay would not have been granted had Cosmopolitan and particularly Flushing not completely obfuscated the factual and legal issues.* The unnecessary complexity created by Flushing, Cosmopolitan and their attorneys, augmented by mischaracterizations and omissions, misled the panel that granted the stay. We will not permit the wrongdoers to profit from their contemptible con-

> duct. *The December 20 stay cannot buffer them from the consequences of their bad faith.* [Emphasis added.]

In addition, the court explored Rothman's arguments as to Flushing's supposed possessory rights. The court rejected them either because Rothman was found to have mischaracterized the prevailing law or to have misrepresented prior proceedings and relevant facts. D18-D22.

The Second Circuit noted that its "foray [into these arguments] was brief" because they were meritless (D18) and because of its hesitation "to assault the reader further." D22 & n.3. The court then held that Rothman "should be penalized for unnecessarily wasting our time." D23.

The Second Circuit's ruling was consistent with the findings of the bankruptcy and district courts. The bankruptcy court already had found the bankruptcy case to be "'tantamount to excessive, vexatious litigation.'" D10. Similarly, the district court, in April 1984, explicitly had stated that it might later determine that the State was entitled to attorneys' fees under 28 U.S.C. § 1927 and had required the escrow deposit of $100,000 before it stayed the bankruptcy court order on appeal before it.[11] On December 7, 1984, the district court further had admonished Rothman that he should not continue his challenge to the State's entitlement to possess its premises because the court felt that "any further application is solely for the purpose of delay. . . ." Transcript of December 7, 1984 proceeding before the district court at 15.

---

11. Since Flushing was not then a party, the district court directed Cosmopolitan alone to deposit the escrow money. *See ante* at 5 & n.7.

This Court Should Deny the Petition

Rothman has not articulated a single "special and important reason" for this Court to invoke its discretion and entertain this case. Rule 17 of the Rules of the United States Supreme Court. He has not shown a conflict among the federal courts of appeals or that the Second Circuit "departed from the accepted and usual course of judicial proceedings . . . to call for an exercise of this Court's power of supervision." *Id.* The only issue here is: Did the Second Circuit violate procedural due process when it sanctioned Rothman after giving him notice that it regarded his conduct as wrong and after affording him an opportunity to respond? The issue does not present "an important question of federal law which has not been decided. . . ." *Id.* On the contrary, precedent from this Court and other federal courts compel the conclusion that the Second Circuit did not err.

The Second Circuit followed *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752 (1980), which holds that an attorney is entitled to procedural due process in the form of adequate notice and an opportunity to be heard before he may be sanctioned under either a court's inherent power or 28 U.S.C. § 1927.[12] The court's award of sanctions against Rothman does not tread upon either this constitutional re-

12. *Roadway* held that courts have the inherent authority to impose sanctions if they comply with fundametal due process, but concluded that 28 U.S.C. § 1927, as then written, could not be a predicate for the award of attorneys' fees. 447 U.S. at 766-67. Congress thereafter amended the statute to provide such a predicate and implicitly adopted the due process requirement established in *Roadway*. *See* H.R. Rep. No. 1234, 96th Cong., 2d Sess. 8, *reprinted in*, 1980 U.S. Code Cong. & Ad. News 2781, 2783.

quirement (petition at 18-26) or upon the right to a jury trial guaranteed by the sixth and seventh amendments. *Id.* at 29-30. As demonstrated below, Rothman's assignment of error depends entirely on his mischaracterizations of fact and his misunderstandings of law.[13]

Rothman claims that he received defective notice because the Second Circuit did not indicate whether sanctions would be based on the frivolousness of the appeal or on his bad faith and because the court did not state its jurisdictional basis for sanctions or the wrongful behavior requiring sanctions. Petition at 21. Rothman also claims that his opportunity to be heard was not at a meaningful time or in a meaningful manner. *Id.* Even if the Court were to accept Rothman's framework of analysis, he fails on each point advanced.

Rothman neglects to mention that he remained silent at oral argument on December 18 and in his reply brief after the State had accused him of bad faith. Rothman also discounts (petition at 23-24) the additional and telling facts that the Second Circuit gave his associate notice during argument on Janauary 23 that: (1) it was disturbed because Rothman had misrepresented the record (January 23 tr. at 5, 9-10, 20); and (2) "an award under Section 1927 . . . [was] one of the issues in this case." *Id.* at 19. He ignores, as well, that his absence from oral argument on January 23 was a waiver of his opportunity to respond,

13. For purposes of the Court's disposition of the petition, the State only discusses the procedural due process to which Rothman was entitled under Section 1927 or under a court's inherent power since he concedes the sufficiency of these jurisdictional predicates. *See* petition at 16. Nonetheless, we believe the Second Circuit had authority to award sanctions against Rothman pursuant to 28 U.S.C. § 1912 and Rule 38 of FRAP. *Contrast* petition at 15-16.

at that time, to the question of bad faith raised by the court. *United States* v. *Nesglo, Inc.*, 744 F.2d 887, 890 (1st Cir. 1984) (claim of deprivation of due process by attorney sanctioned under Section 1927 frivolous because attorney waived hearing opportunity). Most importantly, Rothman refers only in passing to the extra opportunity that the Second Circuit gave to him after the oral argument to defend his conduct and to the lengthy papers he submitted in support of his purported good faith.[14] While Rothman now conveniently excuses the thinness of his explanation by stating that he only there responded "as Flushing's lawyer" and not on his own behalf (petition at 10), his papers before the Second Circuit demonstrate that he was aware of his individual exposure.[15] *See* Rothman br. at 6

14. Rothman has complained that his inability to obtain the transcript of his oral argument before the Second Circuit on December 18 deprived him of notice of the grievances which the Second Circuit expressed during oral argument on January 23. Petition at 10. He would have known the grounds for the Second Circuit's potential award of sanctions if he had attended the oral argument. The Second Circuit's interrogation of Rothman's associate on January 23 provided all who were present with an understanding of why the court had determined to consider an award of sanctions. *See ante* at 6-7. The Second Circuit there took Rothman to task for having misrepresented facts and prior proceeding which included, but were not limited to, Flushing's nonexistent right to possession and the effect of the liquidation order. We further note that Rothman did not make a motion for permission to transcribe the December 18 oral argument when the appeal was *sub judice*, but instead waited nine months. *See* notice of motion for leave to transcribe the tape recording of the oral argument held before this Court on December 18, 1984. The Second Circuit granted Rothman's belated motion. *See* order of the Second Circuit filed October 1, 1985.

15. Rothman wrongly claims here that the Second Circuit erred because it did not isolate the instances of his wrongful conduct from the bad faith committed by the other sanctioned parties and attorneys. Petition at 24. First, a reading of the Second Circuit's decision demonstrates that the court specified Rothman's and Flushing's wrongdoing. The court explicitly stated that Rothman, representing his client (D13), particularly was to blame for the December 20 stay

(footnote continued on next page)

and aff. at ¶ 2. In short, Rothman received all of the process to which he was due. *Tatum* v. *Regents of University of Nebraska Lincoln*, 462 U.S. 1117 (1983).

Rothman also inaccurately reads the authority of the Second Circuit and of the other courts of appeals when he states that appellate courts have been unclear in their articulation of the standard for applying 28 U.S.C. § 1927 or for invoking sanctions pursuant to a court's inherent power. *See* petition at 20-21. As it did here, the Second Circuit consistently has held not only that an appeal must be meritless, but also that the attorney, prosecuting the appeal, be found to have acted in bad faith. *See Sierra Club* v. *United States Army Corp. of Engineers*, No. 84-6287, slip op. at 6518-6519 (2d Cir. Oct 28, 1985) (proceeding must be frivolous and improper purpose must be present); *Tedeschi* v. *Smith Barney*, 757 F.2d 465, 466 (2d Cir.), *cert. denied, sub nom. Chapman* v. *Smith Barney*, 54 U.S.L.W. 3226 (Oct. 10, 1985) (proceedings not instituted in good faith); *Nemeroff* v. *Abelson*, 704 F.2d 652 (2d Cir. 1983); *Browning Debenture Holders' Committee* v. *DASA Corp.*, 560 F.2d 1078, 1088-1089 (2d Cir. 1977) (Section 1927 to be invoked when procedural bad faith

---

which it "mistakenly . . . granted." D19. The court also took Rothman personally to task for his argument relating to his motion for leave to file a late notice of appeal. D17-D18. Second, the Second Circuit understood that the district court had required only Cosmopolitan to deposit money in escrow because, at that time, Cosmopolitan was the only appellant. *See ante* at 10 & n.11. *Contrast* petition at 24. Last, it was well within the court's discretion to assess sanctions jointly and severally because the wrongdoers were in the best position to know their degree of culpability. *United States* v. *Potamkin Cadillac Corp.*, 689 F.2d 379, 382 (2d Cir. 1982); *Muigai* v. *United States*, 682 F.2d 334, 337 (2d Cir. 1982); *Blair* v. *Shenandoah Women's Center*, 757 F.2d 1435, 1438 (4th Cir. 1985). *Contrast* petition at 24.

exists); *Acevedo* v. *INS*, 538 F.2d 918, 920 (2d Cir. 1976) (*per curiam*) (bad faith inferred from complete unsubstantiality of petition). Decisions from the majority of the other courts of appeals are consistent with the holdings of the Second Circuit.[16] *See Baker Industries*, 764 F.2d at 215 & n.3 (requiring attorney bad faith and collecting decisions also requiring bad faith from the District of Columbia, Fourth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuit Courts of Appeals).

Rothman further misstates the precedent of this Court when he claims that the Court approaches the petition with a clean slate. Petition at 18. *Tatum* v. *Regents of University of Nebraska Lincoln*, 464 U.S. at 1117, answers Rothman's "Questions Presented." In *Tatum*, this Court sanctioned an attorney, pursuant to Rule 49.2 of its Rules, for a frivolous appeal after motion practice but without oral argument, an evidentiary hearing or discovery. *See* Martineau, "Frivolous Appeals: The Uncertain Federal Response," 1984 DUKE LAW JOURNAL 845, 873, 877 (quoted and cited extensively in petition, but stating that due process is satisfied if an attorney given notice and written opportunity to respond); *contrast* petition at i; *id.* at 18 & n.14.

Rothman also misapplies Section 1927 precedent of the Second Circuit and its sister courts when he contends that the courts "apparently believe that no pre-sanction hearing or other opportunity to be heard is necessary. . . ." Pe-

16. Contrary to Rothman's claim (petition at 25 & n.18), the courts of appeals also agree with the Second Circuit that the standard of bad faith must be determined under an objective, not a subjective, measurement. *Tedeschi* v. *Smith Barney*, 579 F. Supp. 657, 661 (S.D.N.Y. 1984), *aff'd*, *Tedeschi*, 757 F.2d at 465; *Baker Industries* v. *Cereberus, Ltd.*, 764 F.2d 204, 215 (3d Cir. 1985); *Knorr Brake Corp.* v. *Harbil*, 738 F.2d 223, 227 (7th Cir. 1984).

tition at 23. Rather, the appellate courts have uniformly awarded sanctions only after the provision of notice and an opportunity to be heard. *Smiga* v. *Dean Witter Reynolds, Inc.*, 766 F.2d 698 (2d Cir. 1985), where the Second Circuit upheld an award of sanctions imposed after motion practice, is illustrative.[17] *Smiga* conforms to the procedure followed in *Tatum* and to this Court's pronouncement in *Roadway*, 447 U.S. at 766-767, that courts should afford attorneys "fair notice and an opportunity for a hearing on the record" prior to the imposition of sanctions. *Smiga* also parallels precedent from the Third, Seventh and Ninth Circuits requiring notice and a fair opportunity to rebut allegations of bad faith. *See generally Eash* v. *Riggins Trucking Inc.*, 757 F.2d 557, 570 (3d Cir. 1985); *Textor* v. *Board of Regents*, 711 F.2d 1387, 1395 (7th Cir. 1983); *Miranda* v. *Southern Pacific Transportation Co.*, 710 F.2d 516, 522 (9th Cir. 1983).[18]

---

17. The Second Circuit has construed the requirements of due process similarly for the imposition of other sanctions. *See United States Freight Co.* v. *Penn Central Transportation Co.*, 716 F.2d 954, 955 (2d Cir. 1983) (involving Rule 37 of the Federal Rules of Civil Procedure and finding due process satisfied when a party had notice and opportunity to argue against proposed sanction); *Mildner* v. *Gulotta*, 405 F. Supp. 182, 195, 199 (E.D.N.Y. 1975) (three-judge court), *aff'd*, 425 U.S. 901 (1976) (dismissing on abstension grounds, but stating that court would reject due process challenge to New York's procedure for disciplining attorneys on basis of record alone).

18. Rothman cites *Malhiot* v. *Southern California Retail Clerks Union*, 735 F.2d 1133 (9th Cir. 1984), *cert. denied, sub nom. Jampol* v. *Southern California Retail Clerks Union*, 105 S.Ct. 959 (1985), as establishing that the Ninth Circuit does not require notice and an opportunity to be heard prior to the imposition of sanctions. Petition at 23. As *Miranda* and the earlier decisions of *Barnd* v. *City of Tacoma*, 664 F.2d 1339 (9th Cir. 1983) and *United States* v. *Blodgett*, 709 F. 2d 608 (9th Cir. 1983), demonstrate, the Ninth Circuit's practice is to the contrary. In *Malhiot*, 735 F.2d at 1133, an attorney was sanctioned for his misrepresentations of the record. *Id.* at 1138. He had

(footnote continued on next page)

Rothman's equal protection and sixth and seventh amendments arguments likewise ring hollow given the true import of *Roadway*. *Roadway* does not create the potential that trial and appellate attorneys will be treated unequally. *See* petition at 26. Rather, it establishes the principle that due process must be observed in all courts. In *Roadway*, this Court, citing the dissent in *Gamble* v. *Pope & Talbot, Inc.*, 307 F.2d 729 (3d Cir.) (*en banc*), *cert. denied, sub nom. United States* v. *Mahoney*, 371 U.S. 888 (1962), also rejected earlier authority analogizing the imposition of sanctions to a finding of contempt where greater process—but not a jury trial—must be afforded. 447 U.S. at 766 & n.12. *See also Smiga* at 708. The Court grounded its holding on the view that a court must have power "over members of its bar. . . ." *Id.* at 766. Thus, *Roadway* forecloses Rothman's sixth and seventh amendment arguments. *Contrast* petition at 29.

In closing, we note that the Court is not confronted with a question relating to the administration of justice. *Contrast* petition at 26-28. Attorneys always have known that they must observe the ethical standards of their profession. The Second Circuit sanctioned Rothman because he, as a member of the profession and as an officer of that court, failed to obey these standards.

---

notice that he would be held "to the standards imposed by the American Bar Association's Code of Professional Responsibility" which "requires that attorneys not engaged in conduct that involves misrepresentation. . . ." *Id.* Since the sanctioned attorney could not create a triable issue of fact as to his misrepresentation, there was no need to provide him with any further opportunity to respond. *See Codd* v. *Velger*, 429 U.S. 624, 627 (1977) (no deprivation of due process when hearing would serve no purpose). *See Link* v. *Wabash Railroad Co.*, 370 U.S. 626, 632 (1962). The sanctioned attorney's conduct spoke for itself. *See United States* v. *Nesglo*, 744 F.2d at 891 (hearing unnecessary because court "well acquainted with the conduct . . . counsel. . . .").

Conclusion

For the foregoing reasons, this Court should deny the petition.

Dated: New York, New York
November 25, 1985

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Respondent

O. PETER SHERWOOD
Deputy Solicitor General

JUDITH A. GORDON
BARRIE L. GOLDSTEIN
Assistant Attorneys General
Of Counsel